UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ANTHONY J. FRANCO	)	DOCKET NUMBER SF07528410813
v.	)	
U.S. POSTAL SERVICE	)	DATE APR 23 1985

OPINION AND ORDER

The agency demoted appellant from the position of Supervisor, Auxiliary Garage, Level 16, to the position of Distribution Clerk, Level 5, effective May 20, 1984, based on a single charge of Rude and Discourteous Behavior Toward Postal Managers. In arriving at its decision, the agency considered two elements of appellant's past record, specifically, two Letters of Warning for Abusive Language. On appeal to the San Francisco Regional Office, the presiding official found that the agency had proven the charge by a preponderance of the evidence, that the action promoted the efficiency of the service, and that the penalty of demotion was reasonable. The presiding official also found that appellant had failed to establish his claim of reprisal. In addition, the presiding official summarized his findings with regard to appellant's numerous allegations of procedural error, having rejected them during the course of the hearing. Accordingly, the agency action was sustained.

In his petition for review, appellant raises objections both to the agency actions and the presiding official's conduct of the hearing. Appellant first contends that, because the agency failed, in its response to the petition

for appeal, to specifically deny his allegations, they must be taken as true. He further states that the presiding official erred in not imposing, as he had requested, the sanction of reversing the agency action.

We disagree with appellant's contention that the agency's failure to deny certain of his specific allegations is an admission that they are true. The regulation upon which appellant relies provides in pertinent part that an agency must include in its reply to an appellant's petition for appeal "a specific response to each allegation of appellant's petition admitting, denying or explaining each in whole or in part." 5 C.F.R. § 1201.25(a)(3). The Board's regulations plainly state that an agency admits an appellant's allegations by stating that they are admitted. Since the agency did not make such statements in its response, appellant has wrongly concluded that the agency admitted his allegations. Farmer v. Department of Transportation, 11 MSPB 622 (1982). Cf. Hersman v. National Science Foundation, 2 MSPB 132, 134-5 (1980). On review, we find that the presiding official did not err in concluding that the agency response fully satisfies the requirements of 5 C.F.R. §§ 1201.22(b) and 1201.25.

Appellant contends that he was denied the right to an impartial hearing. Appellant asserts that the presiding official erred in refusing to hear the testimony of his witnesses. The regulations give a presiding official wide discretion to control the proceeding, including authority to exclude witnesses appellant has not shown would offer relevant, material, and nonrepetitious evidence. See 5 C.F.R. § 1201.41(b)(9); Vogel v. Department of Justice, 9 MSPB 30, 31 (1982). In the instant case, appellant was given several opportunities, both before and during the hearing, to proffer what relevant testimony his witnesses would provide. He failed to do so. We concur in the

presiding official's determination that appellant's subordinates, former representatives, and individuals with whom he deals in his function as a sergeant with the National Guard would not provide relevant testimony. Thus we do not find that the presiding official abused his discretion in this matter.

Appellant further asserts that the presiding official "summarily" rejected certain of his allegations,1/ restricting the scope of examination and effectively denying his right to a hearing. A review of the record does not support this contention. In several instances, the presiding official permitted appellant to argue at length and proffer how his questions might lead to relevant testimony. The presiding official's rulings on these matters were well-reasoned, consistent with Board precedent, and in keeping with his broad discretion to control the course of the hearing. See Meyer v. Office of Personnel Management, 8 MSPB 391 (1981). Moreover appellant has not shown the relevance of these allegations to his position. Therefore, even if the presiding official committed error, the error did not prejudice appellant's rights, and consequently, would not provide a basis for reversal. Karapinka v. Department of Energy, 6 MSPB 114 (1981).

Next, appellant contends that the presiding official refused to allow him to question agency witnesses concerning his alleged emotional problems and the agency's obligation to attempt his rehabilitation within the scope of its "PAR" program. Appellant's contention is clearly without merit. If, as it appears, appellant is suggesting that his outbursts and other inappropriate behavior are the result of mental illness, this would constitute an affirmative defense which

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1/ Alleged impropriety of not permitting appellant's union representative to be present at issuance of letter of warning; alleged impropriety of agency's rescinding, then reissuing, letter of proposed removal.

he is required to plead and prove. 5 C.F.R. § 1201.56(b). Yet appellant proferred no evidence that he was physically or mentally impaired, that he was under a doctor's care, or that he wished to avail himself of counseling.[2/] Moreover all three agency witnesses testified that they had no knowledge of any emotional problems on appellant's part. Appellant's allegation as to the cause of his conduct is purely speculative, and we cannot find that the presiding official erred in ruling that appellant had failed to meet his burden in this matter.

Appellant also makes other multiple challenges to the presiding official's factual determinations. We do not find that they raise a serious question which would warrant our review of the entire record. Appellant's mere disagreement with the presiding official's conclusions does not provide a basis for Board review. Weaver v. Department of the Navy, 2 MSPB 297, 298-9 (1980). Nor do we find any reason to disturb the presiding official's findings concerning appellant's failure to show procedural error or otherwise find sufficient evidence to support the alleged predisposition and prejudice of the deciding official.

Finally, appellant alleges that the presiding official erred in not finding the conduct upon which his demotion was based to be privileged. The presiding official found that appellant had twice called two of his supervisors "a bunch of clowns" in a meeting during which he was given a Letter of Warning for using abusive language. Appellant argues that the meeting was essentially a disciplinary proceeding, and that an employee in such a situation can say whatever he desires, since his conduct in responding to charges is privileged. In so arguing, appellant relies

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[2/] The record reflects that appellant elected not to testify at the hearing.

on Farris v. U.S. Postal Service, 13 MSPB 200 (1983), in which the Board stated that employees may generally not be discharged for rude and impertinent conduct in the course of presenting grievances, noting that these protections do not extend to gross insubordination or threats of physical harm.3/

However, appellant's reliance in Farris is misplaced. In that case, the Board addressed appellant's assertion that his conduct in a grievance session was a protected activity under the National Labor Relations Act (NLRA), section 7 as amended, 29 U.S.C. § 157.4/ That section grants certain rights to "employees," and the definition of "employee" specifically excludes "any individual employed as a supervisor." 29 U.S.C. § 152(3). Therefore, by virtue of his supervisory status, appellant lacks standing to assert that his conduct was privileged under the provisions of the NLRA.

Lastly, appellant contends that demotion from a Level 16 position to a Level 5 position is too severe a penalty. We agree. It is true that appellant's past record consists of two Letters of Warning for Abusive Language. Yet the first Letter of Warning was issued less than two weeks before the incident in question, and that incident occurred upon appellant's receipt of the second Letter of Warning. Thus these incidents do not reveal the type of continuing insolent attitude that would warrant removal. Cf. Hemelt v.

3/ In Farris, supra, at 205, the Board found that appellant's behavior, in fact, was not protected since his misconduct was "of a severe nature rather than mere understandable anger in the course of disagreements over matters under discussion."

4/ 39 U.S.C. § 1209(a) provides that Postal Service employee-management relations are subject to the provisions of subchapter II of chapter 7 of title 29.

Veterans Administration, MSPB Docket No. DA07528210639 (June 1, 1981).

Moreover, appellant has fifteen years of more than satisfactory service with the agency. Indeed, appellant was promoted through the ranks so that the last eight years he served in a management capacity. Additionally, although appellant's rude and discourteous conduct can certainly not be condoned, especially where his managerial position is concerned, we note that there was neither a threat of violence nor a calculated attempt on his part to undermine management authority. Therefore, we find that in these circumstances, his conduct does not support demotion, and that the agency action exceeded the bounds of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). We further find that a suspension of 60 days would be the maximum reasonable penalty under all the circumstances.

Accordingly, the petition for review is GRANTED and the initial decision is REVERSED. The agency is ORDERED to cancel the demotion action thereby restoring appellant to his former supervisory position. The agency is ORDERED to substitute, in lieu thereof, the penalty of a suspension for 60 days.

Proof of compliance with this Order shall be submitted by the agency to the Clerk of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the San Francisco Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition

for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.